

A Ibrahim bin Bakar v Seah Ah Han & Anor

HIGH COURT (PENANG) — CIVIL SUIT NO 25-504-81

EDGAR JOSEPH JR J

29 FEBRUARY 1992

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Civil Procedure — Costs — Fee for qualifying to give expert evidence — Whether plaintiff could claim for fee which exceeded stipulated maximum sum — Whether plaintiff had proved special reasons for court to order fee which exceeded stipulated maximum sum — Subordinate Courts Rules 1980 O 48 r 57(3) & proviso

- C** The plaintiff had obtained judgment for personal injuries against the defendants with costs to be assessed on the subordinate court scale. Before the trial the plaintiff was examined by two medical specialists. The medical reports of the specialists were served on the defendants. The defendants initially wanted the plaintiff to be examined by a specialist of their own choice but this did not materialize. At the commencement of the trial, the defendants agreed to the two specialists' reports. However, the two medical specialists, who had already attended the hearing were not called to testify because the defendants had agreed to their reports. The plaintiff claimed that the medical specialists should be paid \$1,000 and \$500 respectively as witness fee.
- D** The defendants did not dispute that both the specialists should be allowed \$100 each for attending court as compensation for their loss of time. The defendants, however, argued that under O 48 r 57(3) of the Subordinate Courts Rules 1980, both the specialists should only be paid the maximum sum of \$200 each for qualifying to give evidence. The plaintiff contended that the proviso to O 48 r 57(3) of the 1980 Rules empowered the court to allow a fee for qualifying to give evidence which is in excess of \$200 if there are special reasons to do so. The plaintiff submitted that the calling of the two medical specialists were essential as a substantial part of the plaintiff's claim related to residual disability suffered by him and urged the court to exercise its discretion in his favour.
- E**
- F**
- G**

Held, allowing the plaintiff partial reimbursement of the fees:

- (1) The two specialists concerned were expert witnesses whose attendance was required by the plaintiff. Therefore by O 48 r 57(1) of the 1980 Rules, a fee is allowable in respect of their attendance in court as well as a fee for qualifying to give evidence as experts. Although the two medical specialists did not give evidence, the court would nevertheless exercise its discretion under O 48 r 57(4) of the 1980 Rules to allow them a fee for qualifying to give evidence.
- H**
- I** (2) The proviso to O 48 r 57(3) of the 1980 Rules gives the court the discretion to allow a fee for qualifying to give evidence exceeding \$200 if there are special reasons to do so. The party seeking the exercise of the court's discretion under the proviso to O 48

- r 57(3) of the 1980 Rules, has the onus to demonstrate special reasons for the exercise of such a discretion in his favour. A
- (3) In this case the plaintiff had failed to demonstrate facts peculiar to the case which set it apart from the countless other running down cases where medical specialists are called. To hold otherwise would amount to indulging the court's human sympathies in disregard of the court's duty to do justice according to law and also create a dangerous precedent. B

Per curiam: The correct procedure for a successful plaintiff to adopt if he desires the court to exercise its discretion in his favour under the proviso to O 48 r 57(3) of the 1980 Rules is to ask for an order that those provisions be invoked and to support it with reasons sufficient to convince a legal mind that there are special reasons for the exercise of the discretion in his favour. This should be done as soon as the judgment is pronounced in the trial court so that if the matter goes on appeal and the issue of costs is reopened, the High Court will have the advantage of the view of the court below. Failure to do so would normally result in the High Court refusing to entertain arguments on this question. C D

[Bahasa Malaysia summary]

Plaintif telah memperolehi penghakiman untuk kecederaan diri terhadap defendan dengan kos yang akan ditaksir mengikut skala mahkamah rendah. Sebelum perbicaraan, plaintiff telah diperiksa oleh dua orang pakar perubatan. Laporan perubatan daripada pakar-pakar itu telah diserahkan kepada defendan. E

Defendan mula-mulanya mahukan plaintiff diperiksa oleh seorang pakar yang dipilih oleh mereka tetapi rancangan ini tidak berjaya. Di permulaan perbicaraan, defendan memberi persetujuan kepada kedua-dua laporan pakar tersebut. Walau bagaimanapun, kedua-dua orang pakar perubatan tersebut yang telah menghadiri perbicaraan itu tidak dipanggil memberi testimoni kerana defendan telah memberi persetujuan kepada laporan mereka. Plaintiff menuntut bahawa kedua-dua orang pakar perubatan itu harus dibayar \$1,000 dan \$500 masing-masing sebagai fee saksi. Defendan tidak menyangkal bahawa kedua-dua orang pakar itu harus dibenarkan \$100 tiap-tiap seorang kerana menghadiri mahkamah sebagai pampasan bagi kehilangan masa mereka. Defendan, walau bagaimanapun, berhujah bahawa di bawah A 48 k 57(3) Kaedah-Kaedah Mahkamah Rendah 1980, kedua-dua orang pakar itu cuma harus dibayar jumlah maksimum \$200 tiap-tiap seorang bagi melayakkan diri memberi keterangan. Plaintiff berhujah bahawa proviso kepada A 48 k 57(3) Kaedah-Kaedah 1980 itu memberi kuasa kepada mahkamah untuk membenarkan fee bagi melayakkan diri untuk memberi keterangan yang melampaui \$200 jika ada sebab-sebab khas untuk berbuat demikian. F G H I

Plaintif mendakwa bahawa pemanggilan kedua-dua orang pakar perubatan itu adalah perlu kerana sebahagian besar tuntutan plaintiff

A adalah berkenaan dengan ketidakupayaan yang tertinggal yang dialaminya dan menggesa mahkamah supaya menjalankan budi bicara bagi faedahnya.

Diputuskan, membenarkan pembayaran balik sebahagian fee itu kepada plaintif:

- B (1) Kedua-dua orang pakar perubatan itu adalah saksi pakar dan kehadiran mereka adalah diperlukan oleh plaintif. Jadi mengikut A 48 k 57(1) Kaedah-Kaedah 1980 itu, suatu fee dibenarkan bagi kehadiran mereka di mahkamah. Begitu juga fee dibenarkan bagi melayakkan diri memberi keterangan sebagai pakar. Walaupun
- C kedua-dua orang pakar perubatan itu tidak memberi keterangan, mahkamah namun demikian akan menjalankan budi bicaranya di bawah A 48 k 57(4) Kaedah-Kaedah 1980 itu untuk membenarkan mereka suatu fee kerana melayakkan diri memberi keterangan.
- D (2) Proviso kepada A 48 k 57(3) Kaedah-Kaedah 1980 itu memberikan mahkamah budi bicara untuk membenarkan fee bagi melayakkan diri untuk memberi keterangan yang melampaui \$200 jika ada sebab-sebab khas untuk berbuat demikian. Pihak yang sedang mengharapkan mahkamah menjalankan budi bicaranya di bawah proviso kepada A 48 k 57(3) Kaedah-Kaedah 1980 itu mempunyai beban menunjukkan sebab-sebab khas untuk penggunaan budi bicara bagi faedahnya.
- E (3) Dalam kes ini, plaintif telah gagal menunjukkan fakta-fakta yang khusus kepada kes itu yang membezakannya daripada kes-kes pelanggaran yang lain yang begitu banyak sekali di mana pakar-pakar perubatan dipanggil. Keputusan sebaliknya adalah sama seperti menurut rasa simpati mahkamah tanpa menghiraukan tugas mahkamah menegakkan keadilan mengikut undang-undang dan juga akan mewujudkan satu duluan yang merbahaya.
- F

Per curiam: Prosedur yang betul yang boleh diikuti oleh seorang plaintif yang berjaya jika beliau mahukan mahkamah menjalankan budi bicaranya bagi faedah beliau di bawah proviso kepada A 48 k 57(3) Kaedah-Kaedah 1980 itu ialah untuk memohon bagi satu perintah agar peruntukan itu digunakan, dan untuk menyokongnya dengan sebab-sebab yang cukup bagi meyakinkan satu fikiran yang dipandukan oleh undang-undang bahawa terdapat sebab-sebab khas bagi penggunaan budi bicara itu bagi faedah beliau. Ini patut dilakukan secepat mungkin selepas penghakiman diberikan di mahkamah perbicaraan supaya jika perkara itu dirayu dan isu kos dibuka kembali, Mahkamah Tinggi akan menerima kelebihan mendengar pendapat mahkamah di bawah. Kegagalan berbuat demikian biasanya berkesudahan dengan Mahkamah Tinggi enggan melayani hujah-hujah atas soalan ini.]

Legislation referred to

Subordinate Courts Rules 1980 O 48 rr 56, 57, Appendix 2

Rf Maneeksha (Rhina Bhar & Associates) for the plaintiff.

Balachandran Mahesan (Bala Mahesan & Co) for the defendants.

Edgar Joseph Jr J: In the High Court at Penang the plaintiff had obtained judgment for \$15,000 being general damages for personal injuries and \$2,327.40 being special damages and interest on both those sums together with costs on the subordinate court scale.

When the solicitors for the plaintiff submitted the draft order to the solicitors for the defendants for approval, the latter deleted a number of items of costs claimed but only two of these now call for consideration; namely, item 22 being \$1,000 witness fee paid to Mr M Shanmugam (consultant orthopaedic surgeon) and item 26 being \$500 witness fee paid to Mr Tan Boon Hoo (consultant orthopaedic surgeon).

Before me, in chambers, the question which arose for decision was whether the plaintiff was entitled to be fully reimbursed in respect of the two sums aforesaid or whether he was only entitled to partial reimbursement and that too limited to the amounts prescribed by Appendix 2 to O 48 r 56 of the Subordinate Courts Rules 1980. After hearing counsel on both sides I decided this question in favour of the defendants.

I then granted the plaintiff's request for further argument in open court when the matter was more fully argued.

To put matters in their proper perspective it is necessary to reproduce O 48 rr 56 and 57 and Appendix 2. They run as follows:

56 Where on the hearing of any proceedings a person attends Court as a witness of fact, or as a witness to produce a document, or as a party to the proceedings, he may be allowed as compensation for loss of time such sum as the Court thinks reasonable, not exceeding the sum prescribed by Appendix 2 to this Order for a person of the class to which the witness or party belongs.

57(1) Where a person attends Court as an expert witness, he may be allowed a fee for attending the Court, and in addition, if allowed by the Court, a fee for qualifying to give evidence as such expert:

Provided that no fee as an expert witness may be allowed in respect of a person attending Court only to prove the correctness of a plan, drawing, chart, photograph or model.

(2) The fee for attending Court shall be such sum as the Court thinks reasonable, not exceeding \$100 nor less than the sum prescribed by Appendix 2 to this Order as compensation for loss of time for a person of the class to which the expert witness belongs.

(3) The fee for qualifying to give evidence shall be such sum as the Court thinks reasonable, not exceeding \$200:

Provided that if in any particular case the Court is satisfied for special reasons that the fee for qualifying to give evidence ought not to be so limited, the fee shall be such sum as the Court directs.

(4) The Court may, if it thinks just, allow the fee for qualifying to give evidence, notwithstanding that the expert witness does not attend the trial.

(5) Where a report in writing has been obtained from a witness who is not entitled to a qualifying fee, the Court may if it thinks such a report was reasonably necessary allow a fee not exceeding \$100.

A Appendix 2

Scale of Allowances

Class of Persons

Maximum
sum per day
\$ ¢

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- | | | |
|---|-----|-------|
| (a) Professional persons, Government officers, directors and managers of corporate bodies, and persons in respect of a salary or income exceeding \$1,000 per month | ... | 50 00 |
| (b) Persons whose salary or income exceeds \$250 but does not exceed \$1,000 per month | ... | 25 00 |
| (c) Other persons | ... | 10 00 |

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Note —

In granting an allowance to a witness regard should be had to —

- (i) his salary or actual or estimated income or circumstances,
- (ii) the time during which he was absent from his ordinary occupation while obliged to attend Court.

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The background facts need to be briefly stated.

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It is true that the solicitors for the plaintiff had served copies of the reports of the two specialists aforesaid upon the solicitors for the defendants in advance of the hearing commencing on 17 February 1987; Mr Shanmugam's report having been served on 11 February 1987 and Mr Tan's report on 13 February 1987, whereupon the solicitors for the defendants replied by letter dated 13 February 1987 saying that perhaps they might wish the plaintiff to be examined by a specialist of their choice, a proposal with which the solicitors for the plaintiff readily agreed.

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However, the solicitors for the defendants never pursued their intention to have the plaintiff examined by a specialist of their choice and it was not until the commencement of the trial that the solicitors for the defendants agreed to the two specialists' reports. This necessitated the plaintiff having to subpoena the two specialists to court and they duly attended the hearing but the solicitors for the defendants having agreed to their reports, they were never called to testify.

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In my view, the provisions pertinent to the circumstances of this case are those of O 48 r 57. It is clear that the two specialists concerned were expert witnesses whose attendance was required by the plaintiff to give evidence as to his residual disabilities which were the direct result of the injuries he had sustained in the collision. Therefore, by r 57(1) a fee was allowable in respect of their attendance in court and, in addition, a fee for qualifying to give evidence as experts was also allowable because although they did not give evidence, r 57(4) expressly provides that the court may, if it thinks just, allow the fee for qualifying to give evidence, notwithstanding that the expert witness does not attend the trial. I would exercise my discretion in favour of the plaintiff in respect of both categories of fees.

H**I**

As to the quantum of these fees, there appeared to be no dispute concerning the claim for fees in respect of the attendance in court resulting in loss of time. However, the quantum of fees for qualifying to give evidence was fiercely disputed.

Counsel for the plaintiff had contended that although generally by r 57(3) the maximum permissible fee for qualifying to give evidence was fixed at \$200, the provisions of the proviso thereto empowered the court, if satisfied that there were special reasons to do so, to allow such a fee in excess of \$200. With this proposition I entirely agree.

The question however is: has the plaintiff satisfied the court of the existence of special reasons to justify the application of the provisions of the proviso in his favour?

In considering this question I do not think that a court should be bound by any rigid rule defining 'special reasons'. However, this much I think is clear and that is that the party seeking the exercise of the court's discretion under the provisions of the proviso, must demonstrate that there are facts peculiar to the particular case which set it apart from others. Bearing in mind these general considerations I must now turn to consider the particular circumstances of the present case.

Now, the calling of medical specialists in running down cases, even in the subordinate courts, is a matter of everyday occurrence. In what way could it be said that where such witnesses are called and a plaintiff obtains judgment against a defendant the court would be justified in exercising its powers under the provisions of the proviso in favour of a plaintiff? I do not wish to lay down any hard and fast rule and the best approach would appear to be to decide each case according to its merits, always keeping in mind that the onus is upon the plaintiff to demonstrate special reasons for the discretion to be exercised in his favour.

I have not overlooked the submission of counsel for the plaintiff that the calling of the two specialists was essential as a substantial part of the plaintiff's claim related to residual disability said to have been suffered by the plaintiff. It was also said that compensation is based on fault and the defendants having been found liable the only question was whether the specialists' fees had been reasonably incurred. It was urged that the discretion of the court should be exercised in favour of the plaintiff.

At the end of the day, I still have to ask myself the question whether the plaintiff has demonstrated special reasons within the meaning of the provisions of the proviso. I regret I am unable to detect facts peculiar to the particular case which set it apart from the countless other running down cases where medical specialists are called. To hold otherwise would amount to indulging my human sympathies in disregard of my duty to do justice according to law. It would also be creating a dangerous precedent.

The result therefore is that I would hold that the plaintiff is entitled to partial reimbursement only of the expenses incurred by him in respect of the two specialists concerned, that is to say, \$100 fee for attending court as compensation for loss of time, \$200 for qualifying to give evidence, in respect of each of them.

By way of postscript I would add that the correct procedure for a successful plaintiff to adopt if he desires the court to exercise its discretion in his favour under the provisions of the proviso, is to ask for an order that those provisions be invoked and to support it with reasons sufficient to convince a legal mind that there are special reasons for the exercise of the

- A** discretion in his favour. The stage at which this should be done is as soon as judgment is pronounced in the trial court, so that if the matter goes on appeal and the issue of costs is reopened the High Court will have the advantage of the view of the court below. Failure to do this would normally result in the High Court refusing to entertain arguments on the question concerned.

B *Partial reimbursement of fees allowed.*

Reported by Wong Kian Kheong

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